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Attorneys for Plaintiff Trustees on Behalf of General Employees Trust Fund

**UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

TRUSTEES ON BEHALF OF GENERAL  
 EMPLOYEES TRUST FUND,

Plaintiff,

v.

MERCHANTS BUILDING MAINTENANCE  
 COMPANY,

Defendant.

Case No.

**COMPLAINT**

PLAINTIFF ALLEGES AS FOLLOW:

**JURISDICTION AND VENUE**

1. This action arises under the National Labor Relations Act, 29 U.S.C. section 185, and under the Employee Retirement Income Security Act, 29 U.S.C. sections 1132 and 1145 for the administration of trust fund business. This Court has jurisdiction as the Defendant's place of business is conducted in multiple San Francisco Bay Area counties, including the counties of San Francisco and Alameda. 29 U.S.C. §1132(e)(2). Furthermore, the trust agreement, which is the basis for Plaintiff's claim, provides that legal action based on the agreement will be proper in the U.S. District Court for the Northern District of California. (Exhibit A, Section 8.07 (p.30))

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3. Plaintiff Trustees on Behalf of General Employees Trust Fund (“Plaintiff” or “Trust Fund”) is an employee benefit plan within the meaning of 29 U.S.C. sections 1002 and 1132(d). Plaintiff is a “Trust Fund” originally established by a Trust Agreement. A copy of the Agreement and Declaration of Trust (restated as of September 1, 2010), and all Amendments, are attached as Exhibit “A”.

## FACTUAL ALLEGATIONS

6. Defendant is also a signatory to a Subscriber Agreement making Defendant a participant in the Plaintiff Trust Fund and binding Defendant to the terms and conditions of the Trust Agreement referenced herein. A true and correct copy of the Subscriber's Agreement is attached as Exhibit "D" and is incorporated by reference.

7. Pursuant to the terms of the CBA and the Subscriber's Agreement, Defendant is bound to make contributions to the Trust Fund on behalf of its eligible employees and their dependents for medical, dental, vision, prescription drug and life insurance coverage.

1           8. Pursuant to the terms of the CBA and the Subscriber's Agreement, Defendant is bound  
2 to transmit the contributions described above to the Trust Fund's Administrative Office by the tenth  
3 (10<sup>th</sup>) day of the calendar month following the month in which the employee has worked.

4           9. Transmission of contributions must be received by the twentieth (20<sup>th</sup>) day of the  
5 calendar month following the month in which the employee has worked. Contributions are  
6 considered delinquent if not fully transmitted and received by the Trust Fund by the 20<sup>th</sup> calendar  
7 day.

8           10. If a contribution is delinquent, the Employer is bound to pay liquidated damages and  
9 interest on the delinquent contributions. Specifically, Article XIII, Section 8.06 provides for ten  
10 percent (10%) liquidated damages for delinquent contributions that are paid more than two days past  
11 the due date. If the Trust Fund files legal action to collect unpaid contributions, the liquidated  
12 damages for delinquent contribution amounts increases to twenty percent (20%) of the contributions  
13 which are due and unpaid.

14           11. In addition to liquidated damages, Article XIII, Section 8.05 provides for the  
15 assessment of simple interest at the greater of (i) seven percent (7%) per annum, or (ii) the rate  
16 prescribed by Section 6621(a)(2) of the Internal Revenue Code, from the date such contributions  
17 were due until paid. Interest also accrues on any assessed liquidated damages.

18           12. Article XIII, Section 8.07 provides that if the employer fails to make any contributions  
19 timely, the Board of Trustees may take legal action to enforce collection and the employer shall be  
20 liable for all reasonable expenses incurred in taking such action, including but not limited to court  
21 costs, auditing fees, all legal expenses and costs, and attorneys' fees.

22           13. Pursuant to the Trust Agreement and Subscriber Agreement the Trustees of the Fund  
23 are authorized to perform an audit of the records of any employer by an auditor of the Trustees' own  
24 selection for the purpose of determining the accuracy and sufficiency of payments made by the  
25 employer to the Trust Fund and otherwise determining whether the employer has complied with all  
26 Trust Fund requirements. (See Exhibit A at Section 8.13; Exhibit D at ¶ 5).

27           14. On February 4, 2019, Plaintiff's auditor, National Compliance Services ("NCS"),  
28 issued a demand notice to Defendant requesting payment of delinquent contributions, liquidated

1 damages, interest, and audit fees for the period January 1, 2017 to May 31, 2018 in the amount of  
2 \$333,280.98. A copy of the notice is attached as Exhibit “E” and is incorporated by reference.

3 15. Plaintiff’s counsel issued three follow-up demand notices to Defendant on December  
4 12, 2019, January 31, 2020, and June 3, 2020. Copies of the demand notices are attached as Exhibit  
5 “F” and are incorporated by reference.

6 16. Defendant has failed to respond to Plaintiff’s requests for payment of its delinquent  
7 contributions, liquidated damages, interest, and audit costs.

8 17. NCS determined that Defendant currently owes \$391,149.92 to the Trust Fund in  
9 delinquent contributions, liquidated damages, claims paid, audit fee, and interest. A copy of the audit  
10 listing the amounts owed the Trust Fund is attached as Exhibit “G” and is incorporated by reference.

### 11 **CAUSE OF ACTION**

#### 12 **Collection of Delinquent Contributions**

13 18. Plaintiff realleges and incorporates by reference the allegations set forth above as  
14 though fully set forth herein.

15 19. Defendant has not paid all contributions owed on behalf of covered employees and  
16 their dependents for the period of January 1, 2017 through May 31, 2018. This failure resulted in a  
17 deficiency of \$271,074.65 in delinquent unpaid contributions owed to the Plaintiff. A breakdown of  
18 the amount owed is attached as Exhibit “G” and is incorporated by reference.

19 20. Defendant owes \$54,214.93 (20% of \$271,074.65) in liquidated damages for late  
20 payment of the contributions owed for the period of January 1, 2017 through May 31, 2018. The  
21 interest amount is unknown at this time because the underlying contributions have not been paid. A  
22 breakdown of the amounts owed is attached as Exhibit “G” and is incorporated by reference.

23 21. Defendant owes \$57,557.83 in interest, calculated at an annualized rate of 7%, on its  
24 unpaid delinquent contributions and liquidated damages for the period January 1, 2017 through May  
25 31, 2018. A breakdown of amounts owed is attached as Exhibit “G” and is incorporated by  
26 reference.

27 22. Defendant owes \$61.51 in claims paid for the period of January 1, 2017 through May  
28 31, 2018. The amount is set forth in Exhibit “G” and is incorporated by reference.

23. Defendant owes Plaintiff \$8,241.00 to conduct an audit of its unpaid delinquent contributions. The amount is set forth in Exhibit "G" and is incorporated by reference.

24. Despite repeated attempts by the Plaintiff to collect these amounts, Defendant has not paid the outstanding contributions, liquidated damages, claims paid, and audit fee. True and correct copies of the demand letters sent to Defendant are attached as Exhibits "E" and "F" and are incorporated by reference.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests a judgment ordering payment as follows:

1. \$271,074.65 in unpaid contributions now due and owing for January 1, 2017 through May 31, 2018;
2. \$54,214.93 in unpaid liquidated damages now due and owing for January 1, 2017 through May 31, 2018;
3. \$61.51 in unpaid claims paid now due and owing for January 1, 2017 through May 31, 2018;
4. \$57,557.83 in interest now due and owing on unpaid contributions and liquidated damages from January 1, 2017 through May 31, 2018;
5. \$8,241.00 in audit fees.
6. Reasonable attorney's fees and costs in this action pursuant to 29 U.S.C. section 1132(g)(2)(D) and the Trust Agreement; and
7. For such other and further relief as may be proper.

Dated: September 30, 2020

BEESON, TAYER & BODINE, APC

By: /s/ Catherine E. Holzhauser  
 CATHERINE E. HOLZHAUSER  
 CHRISTOPHER O. HAMMER  
 Attorneys for Trustees on Behalf of General  
 Employees Trust Fund